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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/524,106	02/10/2005	Stefan Beesc	246472007500	4244
25227	7590	08/21/2007	EXAMINER	
MORRISON & FOERSTER LLP			REYNOLDS, STEVEN ALAN	
1650 TYSONS BOULEVARD				
SUITE 400			ART UNIT	PAPER NUMBER
MCLEAN, VA 22102			3728	
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08/21/2007		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/524,106	BEESE, STEFAN	
	<b>Examiner</b> Steven Reynolds	<b>Art Unit</b> 3728	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

1) Responsive to communication(s) filed on 10 February 2005.  
 2a) This action is **FINAL**.                            2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

4) Claim(s) 1-26 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-26 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on 10 February 2005 is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date: _____
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date <u>2/10/05, 5/9/05</u> .	5) <input type="checkbox"/> Notice of Informal Patent Application
	6) <input type="checkbox"/> Other: _____.

**DETAILED ACTION**

***Specification***

1. The disclosure is objected to because of the following informalities: On page 11, line 17, "shaped depressions 11" should be "shaped depressions 21".  
Appropriate correction is required.

***Drawings***

2. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(4) because reference character "25" has been used to designate both the hinge and a portion of the bottom part that connects to the lid. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Double Patenting***

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the

unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-26 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-17 of copending Application No. 10/522709. Although the conflicting claims are not identical, they are not patentably distinct from each other because it would be obvious to vary the combination of claim limitations.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining

obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. Claims 1, 2, 4-7, 9, 11, 12, 14, 15, 25 and 26 are rejected under 35 U.S.C. 103(a)

as being unpatentable over White (US 3,327,918) in view of Lapp (US 5,282,534).

White discloses a foodstuffs packaging unit, comprising a bottom part (10) having a row of shaped depressions (16) formed therein capable of accommodating separate articles and a shaped lid part (12), which is arranged for swing action on the bottom part and, in a closed state, bounds an interior together with the bottom part, and has a trough (area between 44 and 42) formed therein that is open in an upward direction and has dimensions capable of accommodating at least one of the separate articles, the trough having a depth that is not greater than a maximum nesting height of the foodstuffs packaging. White discloses the claimed invention except for the cover, which closes off the trough in the upward direction.

However, Lapp teaches a cover (sticker 32) covering the top of the package for the purpose of securely holding an article until the cover is removed to access the article. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the device of White with the cover as

taught by Lapp in order to enclose articles and prevent the articles from dropping out of the foodstuffs packaging until accessed by the user.

Regarding claims 4-7, the modified device of White discloses the lid part is provided with retaining depressions (spaces between eggs holes 44) connected to the trough; the trough and the retaining depressions have approximately the same depth; the trough or the retaining depressions has a depth which is no greater than a maximum nesting height of the foodstuffs packaging; and the retaining depressions are offset laterally in relation to the shaped depressions.

Regarding claims 9, 11, 12, 14, 15, 25 and 26, the modified device of White discloses the bottom part and the lid part being provided with complementary clamping elevations (bottom portion of compartments 16) and clamping openings (openings between gables 28 and bar 42); the clamping openings are offset approximately centrally over adjacent clamping elevations; the lid part has a top edge configured such that the spacing of the nearest clamping opening is less than or equal to the free spacing between two adjacent clamping elevations; at least six clamping elevations arranged in a double row are provided; the retaining depressions are designed as the clamping openings and the shaped depressions are designed as clamping elevations; and the articles being packaged are eggs.

8. Claims 1, 2, 9, 13, 14, 20, 25 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lemaire (US 5,695,062) in view of Lapp (US 5,282,534). Lemaire discloses a foodstuffs packaging unit, comprising a bottom part (5) having a

row of shaped depressions (19) formed therein capable of accommodating separate articles and a shaped lid part (21/23), which is arranged for swing action on the bottom part and, in a closed state, bounds an interior together with the bottom part, and has a trough (area between 27 and 29) formed therein that is open in an upward direction and has dimensions capable of accommodating at least one of the separate articles, the trough having a depth that is not greater than a maximum nesting height of the foodstuffs packaging. White discloses the claimed invention except for the cover, which closes off the trough in the upward direction.

However, Lapp teaches a cover (sticker 32) covering the top of the package for the purpose of securely holding an article until the cover is removed to access the article. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the device of Lemaire with the cover as taught by Lapp in order to enclose articles and prevent the articles from dropping out of the foodstuffs packaging until accessed by the user.

Regarding claims 9, 13, 14, 20, 25 and 26, the modified device of Lemaire discloses the bottom part and the lid part being provided with complementary clamping elevations (bottom portions of pockets 19) and clamping openings (portions between walls 32 and 34); the clamping elevations and the clamping openings appear to have a conicity of 2° to 15°; at least six clamping elevations arranged in a double row are provided; the clamping elevations and the clamping openings appear to have a conicity of 7° to 9°; and the articles being packaged are eggs.

9. Claims 1, 2, 4, 6-10 and 14-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown et al. (US 4,205,777) in view of Lapp (US 5,282,534). Brown et al. discloses a foodstuffs packaging unit, comprising a bottom part (1) having a row of shaped depressions (14) formed therein capable of accommodating separate articles and a shaped lid part (2), which is arranged for swing action on the bottom part and, in a closed state, bounds an interior together with the bottom part, and has a trough (area between 30 and 31) formed therein that is open in an upward direction and has dimensions capable of accommodating at least one of the separate articles, the trough having a depth that is not greater than a maximum nesting height of the foodstuffs packaging. White discloses the claimed invention except for the cover, which closes off the trough in the upward direction.

However, Lapp teaches a cover (sticker 32) covering the top of the package for the purpose of securely holding an article until the cover is removed to access the article. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the device of Brown et al. with the cover as taught by Lapp in order to enclose articles and prevent the articles from dropping out of the foodstuffs packaging until accessed by the user.

Regarding claims 4, 6 and 7, the modified device of Brown et al. discloses the lid part is provided with retaining depressions (49) connected to the trough; the trough or the retaining depressions has a depth which is no greater than a maximum nesting height of the foodstuffs packaging; and the retaining depressions are offset laterally in relation to the shaped depressions.

Regarding claims 8-9, the modified device of Brown et al. discloses the retaining depressions have an indent (46) on their floor; the bottom part and the lid part being provided with complementary clamping elevations (15) and clamping openings (32).

Regarding claims 10, 16-18 and 22, the modified device of Brown et al. discloses the claimed invention except for the specific nesting height of the clamping elevations and clamping openings. It would have been an obvious matter of design choice to have made the nesting height any dimension in order to better stabilize the packages, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

Regarding claims 19-21, the modified device of Brown et al. discloses the claimed invention except for the specific conicity of the clamping elevations and clamping openings. It would have been an obvious matter of design choice to have made the conicity any dimension in order to better stabilize the packages, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955).

Regarding claims 14, 15 and 23-26, the modified device of Brown et al. discloses at least six clamping elevations arranged in a double row are provided; the retaining depressions are designed as the clamping openings and the shaped depressions are designed as clamping elevations; and the articles being packaged are eggs.

10. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over White (US 3,327,918), Lemaire (US 5,695,062) and Brown et al. (US 4,205,777) in view of Lapp (US 5,282,534) as applied to claim 2 above, and further in view of (JP 2001-48156). The devices of White, Lemaire and Brown as modified by Lapp above disclose the claimed invention except for the specifics of the cover. However, (JP 2001-48156) teaches an egg package comprising a cover (3) pulled around an edge of the lid part for more space for product information. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the cover of the devices of White, Lemaire and Brown to extend over opposing edges of the lid part as taught by (JP 2001-48156) in order to have more surface area on the cover for product information.

### ***Conclusion***

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Newsom (US 2,160,893), Jacobs et al. (US 4,742,953), Carter (US 5,582,297) and Pearl (US 3,396,895).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Reynolds whose telephone number is (571)272-9959. The examiner can normally be reached on Monday-Friday 9:00am - 4:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on (571)272-4562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

SR

8/15/07



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